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VIA HAND DELIVERY

September 26, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from the undersigned, on behalf of the Smart Buildings Policy Project, to Mr. Jeffrey Steinberg of the Wireless Telecommunications Bureau delivered today that concerns the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Buildings Policy Project's written ex parte presentation.

Respectfully submitted,

Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

cc: Jeffrey Steinberg (WTB)
Jim Schlichting (WTB)
Leon Jackler (WTB)
Wilbert Nixon (WTB)
David Furth (WTB)
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Enclosures

No. of Copies rec'd 0+3
List A B C D E

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September 26, 2000

Mr. Jeffrey S. Steinberg, Deputy Chief
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W., Room 4-C236
Washington, DC 20554

Dear Mr. Steinberg:

The Commission's interpretations of Section 224 as well as the statutory language itself indicate that where a telecommunications carrier obtains access to a utility's right-of-way pursuant to Section 224, the underlying fee owner cannot preempt the carrier's federally-granted right of access. For example, in the *Local Competition Order*, the Commission explained that "the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access."[1] Section 224(f)(2) lists the appropriate bases for a utility's denial of telecommunications carrier access to its rights-of-way. Namely, a utility is permitted to deny access to its rights-of-way where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[2] The list of exceptions notably does *not* include the failure of an underlying fee owner to allow access to the utility right-of-way by the telecommunications carrier. There is no reason for the Commission to unnecessarily restrict the application of this otherwise pro-competitive statutory provision.

Indeed, were the separate authorization of the underlying fee owner required before obtaining access to a utility right-of-way (a legal interest *already* conveyed to the utility by the fee owner),

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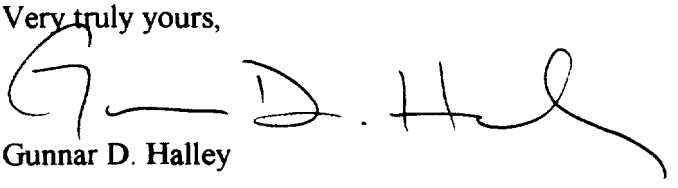
1 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1179 (1996). The Commission should not defer to the potentially fifty different interpretations of "right-of-way" under State law to give effect to a federal statute. The undefined term "right-of-way" can and should be given effect for purposes of Section 224 by the Commission in light of the manifestly apparent intent of the statute to eliminate -- to the largest extent possible -- barriers to the construction and operation of efficient and competing telecommunications networks. The Commission's interpretation of this term -- undefined by the Communications Act -- is one that is afforded the classic *Chevron* deference by the courts. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1300 (2000).

2 47 U.S.C. § 224(f)(2).

telecommunications carriers effectively would be required to duplicate the right-of-way infrastructure that the utilities have at their disposal. This is entirely at odds with the statutory provision. Section 224 was designed to eliminate the need for telecommunications carriers to obtain separate rights-of-way from underlying fee owners.[3] Requiring telecommunications carriers to independently and redundantly obtain this authorization -- whether it be from the owner of the land on which rights-of-way for stringing telephone lines between poles are located or the owner of the building through which a utility right-of-way extends -- would eviscerate the intent and effective operation of Section 224. In sum, requiring telecommunications carrier to duplicate the utility distribution network by obtaining their own right-of-way authority would render Section 224's access to rights-of-way as nothing more than superfluous verbiage -- an interpretation of the statute that the Commission surely cannot countenance.

I enclose excerpts from filings made in the *Competitive Networks* rulemaking and related dockets that further elaborate on this matter.

Very truly yours,



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Enclosures (4)

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[3] See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 2 (1998)("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.").

WF&G STAMP IN

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

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August 27, 1999

interests and the Commission need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.[56]

3. The Commission Must Define The Scope Of Utility Rights-Of-Way To Permit Use And Access Consistent With Section 224.

Many incumbent utilities are likely to claim that their private rights-of-way do not permit access or use by third parties, that their private rights-of-way do not permit uses different from existing uses, or that negotiation with, approval by, and compensation to the owner of the underlying fee is required before access may be granted. These assertions are not only erroneous, but also threaten to undermine the considered goals of Section 224 by denying access to telecommunications carriers when rights-of-way pass over private property. Deference to state law definitions of the scope of a right-of-way would run counter to the national approach promoted by Section 224. The Commission should define the scope of a utility right-of-way for purposes of Section 224 in such a manner as to permit use of such rights-of-way by competitive telecommunications carriers. This definition need not otherwise alter State law. State law definitions of the scope of easements would remain unchanged, except in cases of applying the federal obligations in Section 224.

When viewed together, the cases demonstrate that the design manifested in the Pole Attachment Act of 1978 and the Telecommunications Act of 1996 may be promoted in the manner recommended by Teligent. These cases recognize that statutorily designated third parties may lawfully access the rights-of-way owned or controlled by utilities without the need for

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[56] A textual analysis lends support to this position. Section 224 applies to rights-of-way "owned or controlled" by the utility, demonstrating that an interest less than ownership suffices for the statute's purposes. 47 U.S.C. § 224(f)(1)(emphasis added).

negotiations with, approval of, and compensation to the owner of the servient property. As the Eleventh Circuit stated:

> Since most developers voluntarily grant easements for use by utilities . . . Congress may force the developer to allow a cable franchise to use the easement without offending the taking[s] c[l]ause of the Constitution. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.[57]

In ruling on whether an electric utility's easement would allow a cable operator to gain access to a subdivision through use of such easement, the Fourth Circuit determined that:

> [t]he fact that an additional wire would be introduced to the many others on the poles does not impose any meaningful increase of burden on [the servient estate's] interest in the underlying property. . . . Moreover, the electrical signals themselves provide no basis for distinction for purposes of measuring the increased burden on the servient estate. Any possible difference would be impalpable and would not impose an additional burden on the servient estate.[58]

Ultimately concluding that the cable operator could use the electric utility's easement over private property, the court noted that it was immaterial for easement purposes that the cable operator was

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[57] Centel Cable Television v. White Development Corp., 902 F.2d 905, 910 (11th Cir. 1990)(quoting Centel Cable Television v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988)). Some cases have expressed an unwillingness to permit a cable operator's access to any building linked to electric, telephone, or video services. See, e.g., Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); see also Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993). However, these cases were decided under 47 U.S.C. § 621(a)(2). Section 621(a)(2)'s compensation mechanism is designed only for damages from the installation, operation or removal of facilities whereas Section 224 is designed to provide "just and reasonable" compensation for access separate from the aforementioned damages. Moreover, by its terms, Section 621(a)(2) is limited to public rights-of-way and dedicated easements, whereas Section 224 is not so limited.

[58] C/R TV v. Shannondale, 27 F.3d 104, 109 (4th Cir. 1994).

not a telephone company, stating that "[t]he transmissions of a telephone company are virtually indistinguishable from transmissions of a non-telephone company transmitting television signals for purposes of a pole and wire easement grant."[59]

Expansion of an existing utility right-of-way over private property to accommodate technological advances is deemed to be within the scope of the original easement and does not require additional compensation to the underlying property owner.[60] Satisfaction of congressionally-mandated access requirements reasonably may be deemed substantially compatible with existing utility easements and should not require that any additional compensation be paid to the underlying property owner.[61]

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59 Id. Moreover, to the extent that a clause allowing "reasonably necessary" use of the easement exists in an easement contract, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 9 F.3d 1394, 1396 (9th Cir. 1993).

60 See C/R TV, 27 F.3d at 108 ("West Virginia cases construe easements to give the easement holder a right 'reasonably necessary' to carry out the purpose of the grant, including the right to utilize technological improvements."); Centel Cable Television Co. v. Cook, 567 N.E.2d 1010, 1014 (Ohio 1990)(holding that "the transmission of television signals through coaxial cable by a cable television company constitutes a use similar to the transmission of electric energy through a power line by an electric company"); Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (1985)(finding that the installation of cable equipment to a pre-existing utility pole did not materially increase the burden on the underlying estate and was consistent with the primary goal of the easement, to provide for wire transmission of power and communication).

61 It is important to note that the cases cited by the Notice concern an attempt by the courts to avoid constitutional issues when interpreting a particular statutory provision. Notice at ¶ 47, n.106. By contrast, the constitutionality of Section 224 has been challenged and upheld in the courts before and after the 1996 amendments. Most recently, the court concluded that the provision expressly provides for a taking of property and survives constitutional scrutiny because it provides for just compensation in exchange for the taking. Gulf Power Co. v. United States, 998 F.Supp. 1386 (N.D. Fl. 1998).

In practice, a private easement's prohibition of telecommunications carrier access to the right-of-way appears to be an issue overstated by the incumbent utilities. The New York State Investor Owned Electric Utilities note that the leading New York case held that "utility company easements are apportionable to cable operators even though the scope of the easement may not specifically include CATV."[62] They go on to state that:

> [a]pportioning the rights granted in existing utility easements has been acknowledged by the courts as the most economically feasible and least environmentally damaging way of installing cable [telecommunications] systems. Prohibiting cable and telecommunications companies from using such easements until compensation is paid to the landowners or until condemnation proceedings are instituted would greatly increase the cost to these companies and possibly deny the public the benefits of telecommunications competition.[63]

Moreover, in the "Access to Poles, Conduit and Rights of Way: Technical Service Description" filed with the Commission by BellSouth in connection with its South Carolina Section 271 application, BellSouth states the following:

> Where BellSouth has any ownership or rights-of-way to buildings or building complexes, or within buildings or building complexes, BellSouth will offer to CLEC through a license or other attachment the right to use any available space owned or controlled by BellSouth in the building or building complex to install CLEC equipment and facilities as well as ingress and egress to such space.[64]

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62 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Comments of New York State Investor Owned Electric Utilities* at 25 (Sep. 26, 1997).

63 Id.

64 Application by BellSouth Corporation for Provision of In-Region, InterLATA Services, CC Docket No. 97-208, *Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina*, Attachment to Affidavit of W. Keith Milner, Appendix A, Exh. WKM-9, "CLEC Information Package: Access to Poles, Ducts, Conduit and Right of Way" at 3 (filed Sep. 30, 1997).

This offer suggests that BellSouth believes it may lawfully offer such access to its private rights-of-way.

Finally, electric utilities may already use their electric easements for purposes other than the transmission of electricity. Indeed, the Commission's rules contemplate the conduction of radio signals through public utility A/C power lines for transmission to AM radio receivers.[65] Moreover, the Wall Street Journal has reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses.[66] Electric utility research of this sort suggests that electric utilities themselves view their electric easements as compatible with the provision of telecommunications services. The Commission should affirm that utilities' private rights-of-way are accessible by carriers offering different services and using similar facilities.[67]

4. The Commission Should Define The Scope Of Utility Rights-Of-Way To Include The Space Necessary To Provide Telecommunications Service Using Any Available Distribution Technology Regardless Of The Technology Used By The Incumbent.

Similarly, confusion is likely to arise concerning the scope of expressly undefined rights-of-way. In many instances, the scope of a utility's ownership or control of an easement will be

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65 See 47 C.F.R. § 15.207 (establishing electric utility conduction limits).

66 See Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall Street Journal at B6 (Oct. 7, 1997).

67 See Telecommunications Services Inside Wiring, CS Docket No. 95-184, *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-376 at ¶ 180 (rel. Oct. 17, 1997)(the Commission recognizing its authority to review restrictions imposed upon the use of existing easements or rights-of-way to provide new or additional services).

difficult to ascertain because its rights have not been reduced to writing. It is important to note that many utilities, including ILECs, have installed conduit and use rights-of-way within an MTE without having entered into a written agreement with the MTE owner defining the rights granted to the utility. The natural propensity toward this type of arrangement is best understood when it is remembered that many of these arrangements developed in monopoly environments. The prospect of additional providers requiring access to the premises typically was not contemplated. Thus, it is important for the Commission to offer guidance on the scope of otherwise undefined utility rights-of-way within MTEs for purposes of Section 224.

If the utility does not occupy or have rights to occupy any specifically defined space, it would be reasonable to presume that the utility would have rights to occupy any spaces to which access would be reasonably necessary in order to provide its service using any one of the variety of distribution technologies available now or in the future. For example, unless the MTE owner has affirmatively prohibited the utility from placing facilities on the rooftop or in a certain space within the MTE, it should be assumed that such access is permitted. In this regard, Teligent agrees with the position asserted in WinStar's Petition for Reconsideration and Clarification[68] that even where a utility has chosen not to use the right-of-way for distribution facilities, it should be required to permit CLEC access to such right-of-way for the distribution facilities of the CLEC.

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[68] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *WinStar Communications, Inc. Petition for Clarification or Reconsideration* (Sep. 30, 1996).

In this regard, it is important to note that many utilities, including ILECs, presently maintain antennas on MTE rooftops to transmit telecommunications and/or video signals.[69] If ILECs and other utilities are securing rooftop access derived from their utility status, CLECs must be given the same opportunity.

5. Section 224 Applies To Rights-Of-Way Over Private Property

The Commission is also correct to interpret the absence of any qualifier in Section 224 as to public and private rights-of-way to mean that access to utility easements over private property (private rights-of-way) are covered as well as those over public property (public rights-of-way).[70] This interpretation is particularly sound given that Section 253 -- a provision adopted simultaneously with the amendments to Section 224 -- *does* contain a qualifier. Established principles of statutory interpretation dictate that the absence of such a qualifier in Section 224 is

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69 See, e.g., "Bell Atlantic Debuts Satellite Television Service," Communications Today, (September 18, 1999)("Using a single rooftop dish, Bell Atlantic can supply digital signals to every residence in a building. [Bell Atlantic] engineers and technicians also will equip each building with an appropriate rooftop antenna capable of receiving local digital television broadcasts . . . "); "BellSouth, GTE Still in MMDS Game," Multichannel News (November 30, 1998)("GTE also entered wireless cable through acquisition, purchasing Oahu Wireless Cable in Oahu, Hawaii, in May 1997."); Su-Jin Yim, "Cellular Technology Holds an Edge in Race for Fast Internet Access," The Oregonian (February 16, 1999)("In April [1999], U S WEST plans to start experimenting in its Minneapolis labs with fixed wireless Internet access for home users."); Mimi Whitefield, "BellSouth to Build Cable, Internet Service in Miami Area," The Miami Herald (May 24, 1999)("During the fourth quarter [of 1999], BellSouth also will introduce wireless cable to South Florida. It already offers digital wireless cable in Orlando, Atlanta and New Orleans."); Michael E. Kanell, "BellSouth Considers Satellite for TV Service," The Atlanta Constitution at D1 (May 19, 1999)("To be a customer for BellSouth's wireless [cable] service, a customer must have a receiver placed on a roof . . . ."); Communications Daily, May 7, 1999 (noting that the FCC Cable Bureau said that "even though [BellSouth's] service was wireless cable, its ownership by BellSouth meant it fell under LEC effective-competition rules").

70 Notice at ¶ 41.

meaningful.[71] If "private" right-of-way is to mean anything, the term must refer to rights-of-way secured over private property (as distinct from public property such as streets and other thoroughfares).[72]

6. A Utility Right-Of-Way Need Not Be Owned By The Utility To Fall Within Section 224.

The "owned or controlled" language of Section 224 indicates that utility ownership of conduit or rights-of-way is not necessary to trigger the Section 224 access requirements. Mere utility control is sufficient. This further supports the reading of rights-of-way to include private rights that are not secured in fee simple. Moreover, use of the term "controlled" suggests that even where an MTE owner owns the intra-building conduit, if the ILEC maintains control over that conduit (i.e., pursuant to a maintenance agreement), that conduit is a Section 224 conduit or right-of-way to which the competitive telecommunications carrier should also have access.

7. The Commission Should Continue To Require A Utility's Exercise Of Eminent Domain Authority Where Necessary To Accommodate Telecommunications Carrier Facilities.

Consistent with the *Local Competition Order*, if an MTE owner seeks to prohibit a utility from allowing a telecommunications carrier access to the rooftop notwithstanding a Section 224

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71 See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990)(noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also Walters v. Metropolitan Educational Enterprises, 519 U.S. 202, 209 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

72 Moreover, Section 224 requires the provision of nondiscriminatory access to "any pole, duct, conduit, or right-of-way" owned or controlled by a utility. 47 U.S.C. § 224(f)(1) (emphasis added). The word "any" cannot reasonably be interpreted as a term of limitation.

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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

SEP 27 1999

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September 27, 1999

unequivocally that circumstances demand clarifying this statement for purposes of implementing Section 224.

B. Section 224 Does Not Require Authorization By MTE Owners For Telecommunications Carrier Access To Utility Distribution Facilities.

Section 224 grants access to rights-of-way that are owned or controlled by utilities. The statute assumes that the MTE owner has already granted the utility an interest in the right-of-way to which the statute mandates telecommunications carrier access. Nevertheless, many utilities and real estate interests claim that Section 224 does not grant telecommunications carriers a federal right to access utility rights-of-way. Instead, they contend, MTE owners may unilaterally void this federal right by refusing access to competitive telecommunications carriers.[19]

Section 224 was designed to eliminate the need for telecommunications carriers to obtain separate rights-of-way from MTE owners.[20] Requiring telecommunications carriers to obtain the authorization of the underlying MTE owner would eviscerate the intent of Section 224.[21] In

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19 See, e.g., Comments of American Electric Power et al. at 16; Ameritech at 3-4; BellSouth at 13; Cincinnati Bell at 5-6; City and County of San Francisco at 10-11; Communication Associations Institute at 17; Cornerstone Properties et al. at 10-11, 35; Florida Power & Light at 22; National Association of Counties et al. at 9; Real Access Alliance at 28-29; SBC at 3; and UTC/Edison Electric Institute at 5.

20 See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also id. at ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants").

21 Section 253(c)'s preservation of State and local right-of-way management authority preserves the ability of States and municipalities to require telecommunications carriers to seek governmental authorization before installing their facilities in the public rights-of-way

essence, the utility and real estate theory would have telecommunications carriers duplicate the utility distribution network by obtaining their own right-of-way authority, rendering Section 224 as nothing more than superfluous verbiage. In adopting Section 224 Congress clearly did not contemplate this result. To the contrary, Section 224 seeks to avoid such unnecessary duplication so as to facilitate the development of facilities-based competition in the least disruptive manner to public and private property. A statute must not be construed so as to render any provision meaningless.[22] Indeed, even if the interpretation of Section 224 proposed by the Commission were to effect a taking -- and it does not do so -- it would be upheld by the courts since no other interpretation (*i.e.*, requiring underlying property owner consent) could achieve the goals Congress sought to achieve through enactment of that provision of the statute.[23]

Similarly, the Commission must prohibit agreements between utilities and MTE owners that proscribe the use of intra-building rights-of-way or conduit by telecommunications carriers.

(even when such rights-of-way are owned or controlled by utilities). Of course, this State and municipal authority must be exercised on a competitively neutral and nondiscriminatory basis. By contrast, the Communications Act does not contain a preservation of underlying MTE owner authority to require telecommunications carriers to obtain MTE owner approval for accessing a utility's rights-of-way within the MTE.

22 See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also, Walters v. Metropolitan Educational Enterprises, 117 S.Ct. 660 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-539 (1955)).

23 Although courts seek to avoid statutory interpretations that implicate serious constitutional problems with the statute, they refrain from this tendency when such interpretations would be contrary to the intent of Congress. See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 629-630 (1993)(citations omitted).

Utilities cannot be permitted to contract away their federal obligations.[24] Indeed, such agreements could operate in a manner similar to exclusive access agreements by making it difficult, if not impossible, for competing facilities-based carriers to obtain access to certain MTEs. And, once again, Section 224 would be rendered meaningless -- simple for monopolies to evade.

Similarly, the comments of utilities and real estate interests conflict as to who precisely controls access to rights-of-way within and on top of MTEs. Utilities claim either that they do not own or control intra-MTE rights-of-way and conduit, or that such rights-of-way and conduit may be used exclusively by the utility.[25] By contrast, some of the real estate interests contend that they do not maintain or control the intra-MTE rights-of-way but rather that the ILECs and other utilities control who may operate in those distribution facilities.[26]

The conflicting accounts very well may reflect sincere misunderstandings. Many of these utility rights-of-way and conduits within MTEs were created and are operated without the benefit of a written agreement clarifying the rights and interests of the respective parties.[27] Predictably, then, the precise scope of the utility rights and interests within MTEs remains difficult to discern.

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24 See Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 710 (1945)("[C]ourts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy"); see also In re Trans World Airlines, Inc., 145 F.3d 124, 135 (3rd Cir. 1998)("Contracts that are void as against public policy are unenforceable regardless of how freely and willingly they were entered into.").

25 See Comments of Ameritech at 3; Avista at 2 (case-by-case inquiry as to ownership or control); BellSouth at 10; Cincinnati Bell at 3, 5; Florida Power & Light at 13; GTE at 22; SBC at 5; USTA at 3, 8; and UTC/Edison Electric Institute at 6.

26 See, e.g., Comments of Cornerstone Properties et al. at 35.

27 See, e.g., Comments of Apex Site Management at 8 ("Apex acknowledges that the incumbent LECs currently enjoy an economic advantage over the competitive LECs because their occupancy often is free and not subject to a written agreement."); Cornerstone Properties et al. at 13 ("ILECs demand access to buildings, but refuse to sign

The process of defining the scope of such rights will be somewhat arbitrary if left to these parties The responsibility for this process, therefore, should lie not with the utilities and the MTE owners who may act upon incentives unfriendly to telecommunications competition; rather, the Commission should assume this role and should clarify that conduits and rights-of-way within and on top of MTEs are owned and/or controlled by utilities.

The practical result of a lack of clarity concerning the scope of utility interests within MTEs affects not only Section 224 interpretations, but MTE access generally. Competitive facilities-based telecommunications carriers seeking to install cables in MTE risers with the permission of the MTE owner sometimes encounter ILEC claims of exclusive ownership of those riser spaces. Without a written agreement to the contrary, the MTE owner retains little basis to assert otherwise. The tenants and the CLECs are thereby left without the means to access each other, notwithstanding an MTE owner's willingness to permit competitive telecommunications carriers within the MTE.

Teligent's own experience offers evidence of this phenomenon. Notwithstanding MTE owner claims to the contrary, Bell Atlantic has contended to Teligent that it owns the risers that travel vertically from floor to floor in Boston MTEs. Incredibly, it has gone so far as to request from Teligent a list of all buildings and risers in Boston to which MTE owners have granted Teligent access, ostensibly to check whether any risers Bell Atlantic may claim to control are covered. It seeks to prohibit telecommunications carriers from accessing these MTE risers.

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agreements with building owners, pay license fees, or otherwise accept the terms and conditions the building owner has set for access by *all* TSPs, often threatening to withhold service from tenants. Given the tremendous market power of the ILECs and the tenant demand for their service, an owner can do little in these circumstances but give in to their demands.").

Clearly, such a policy would potentially have a severe effect on the ability of consumers in MTEs to take telecommunications service from competitive facilities-based carriers. Whether the MTE owner or Bell Atlantic owns or controls access to Boston MTE risers is an issue demanding resolution. In addition, ILECs cannot be permitted to assert ownership as a means of preventing facilities-based competition within MTEs. Application of Section 224 to intra-MTE conduits and rights-of-way and clarification of ownership would deter ILECs from engaging further in this strategy.

C. The Application Of Section 224 Within And On Top Of MTEs Would Be Constitutionally Sound.

The application of Section 224 to intra-MTE conduit and rights-of-way would provide for adequate compensation to the underlying utility in a constitutionally sound manner. Hence, it cannot be regarded as an unconstitutional taking of utility property.[28] Moreover, the MTE owner has already granted these property interests to utilities, so no additional property interests are being "taken" from the MTE owner. To the extent that a utility must exercise its eminent domain authority to provide space for telecommunications carriers, the MTE owner will be compensated appropriately by the utility and the telecommunications carrier will reimburse the utility for that expense, pursuant to the Commission's pole attachment modification rules. Hence, the constitutional rights of the underlying property owners will be preserved.

Notwithstanding the constitutional soundness of this approach, Teligent suspects that the need for a utility to exercise eminent domain authority within MTEs will be a very rare occurrence. Because eminent domain proceedings can be lengthy and expensive, most parties --

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[28] See Gulf Power Co., No. 98-2403, slip op. at 18 (11th Cir.).

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

COMMENTS OF TELIGENT, L.L.C.

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September 26, 1997

rudimentary antitrust analysis, is clear: Congress sought to diffuse monopoly control over essential facilities to permit the development of competition. It would derogate this goal for the Commission to construe Section 224 in a manner that opens only some essential facilities to competitive use and not others. A narrow interpretation of Section 224 to exclude building access risks perpetuating monopoly control over tenants in buildings, a result at odds with the stated goal of the 1996 Telecommunications Act.[9]

B. A Textual Analysis Reveals The Broad Use Of The Term "Right-Of-Way" In Section 224.

The rights-of-way to which telecommunications carriers are granted access in Section 224 are not limited to public rights-of-way, but include private rights-of-way, as well. Congress used the term "public rights-of-way" in Section 253(c), but omitted the "public" modifier in Section 224. Canons of statutory interpretation advise interpretations that do not render provisions meaningless.[10] The absence of a modifier in

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9 See Local Competition Order at ¶ 16 (observing that "[v]igorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs").

10 See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also, Walters v. Metropolitan Educational Enterprises, 117 S.Ct. 660 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-539 (1955)).

Section 224's use of "rights-of-way" strongly indicates that it is not subject to the restriction in Section 253(c) and, thus, includes private rights-of-way, as well as public.

Because Section 224 rights-of-way are not limited to public rights-of-way, they are not limited to streets and other public thoroughfares. Rather, rights-of-way may include a utility's right to use or access parts of a privately-owned building. If that right extends to a building's rooftop, Section 224 would grant telecommunications carrier access to that rooftop right-of-way.

C. Historic Interpretations Assist In Defining The Term "Right-Of-Way" For Purposes of Section 224.

The term "right-of-way" is not defined in the Communications Act. Nevertheless, Congress is not unfamiliar with the term in the context of common carriers as evidenced by other statutes. These statutes, and the cases interpreting them, reveal that rights-of-way are not rarely encountered. Rather, they comprise a legal interest, often less than a fee, to use or pass over another entity's property.[11] Some courts have defined this right as an easement[12] while others describe a right-of-way as a

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11 See Black's Law Dictionary 1326 (6th ed. 1990) (defining a right-of-way as the "[t]erm used to describe a right belonging to a party to pass over land of another"). The Federal Bureau of Land Management's rules offer a definition of right-of-way that supports this broad view: "the public lands authorized to be used or occupied pursuant to a right-of-way grant." 43 C.F.R. § 2800.0-5(g).

12 See, e.g., Bd. of County Supervisors of Prince William County, Virginia v. United States, 48 F.3d 520, 527 (Fed. Cir. 1995) ("'Rights-of-way' are another term for easements, which are possessory rights in someone else's fee simple estate"), cert. denied, 116 S.Ct. 61 (1995); see also Great

license or contractual agreement.[13] Regardless of the particulars, rights-of-way encompass a broad conceptual spectrum of property interests and the Commission need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.[14]

Northern Rwy Co. v. United States, 315 U.S. 262, 279 (1942)(rights-of-way granted by the 1875 Right of Way Act to constitute easements). The Right of Way Act of 1875 offers an example of the legislative construction of a right-of-way. The goal of the Right of Way Act, which granted rights-of-way to railroads, is closely analogous to the driving force behind Section 224. The law was designed to promote the public interest by facilitating the construction of nationwide common carrier facilities through grants of access to lands not owned by the common carrier. Interpreting the Act, the Supreme Court determined that Congress used the term "right-of-way" interchangeably with easement. See id. The Court observed that "Congress itself in later legislation . . . interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, declaring a forfeiture of unused rights of way, provides in part that: 'the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement.'" Id. at 276 (citations omitted). Moreover, the Court noted that the legislative history of a similar Act passed later that year expressed the view that rights-of-way and easements were to be viewed interchangeably. "The House committee report on this bill said: 'the right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes.'" Id. at 277 (quoting H. Rep. No. 4777, 59th Cong., 1st Sess. at 2).

13 See, e.g., Wilderness Society v. Morton, 479 F.2d 842, 853-54 (D.C. Cir. 1973) ("A right-of-way is most typically defined as the right of passage over another person's land. It has been said that '[a] right of way is nothing more than a special and limited right of use,' a definition that sounds remarkably similar to the special land use permit issued in this case")(citations omitted), cert. denied, 411 U.S. 917 (1973).

14 A textual analysis lends support to this position. Section 224 applies to rights-of-way "owned or controlled" by the utility, demonstrating that an interest less than ownership suffices for the statute's purposes.

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REPLY TO OPPOSITIONS TO THE PETITION FOR RECONSIDERATION AND CLARIFICATION OF TELIGENT, INC.

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May 22, 1998

These comments represent a serious misunderstanding of Teligent's request which bears clarification so that the Commission does not similarly misinterpret Teligent's Petition. Teligent does not seek access to the roofs of utility corporate offices qua corporate offices. Consistent with the Interconnection Order, Teligent seeks access to utilities' distribution facilities; it merely requests express clarification from the Commission that where utilities have rights-of-way within or on top of buildings -- that is, the right to use or access space for purposes of providing utility service -- such rights-of-way are subject to the access requirements of Section 224. The Commission did not resolve this issue in the Interconnection Order.

III. UTILITIES HAVE THE AUTHORITY AND OBLIGATION TO GRANT ACCESS TO PRIVATE RIGHTS-OF-WAY.

Several parties claim that utilities lack authority to grant telecommunications carriers access to their rights-of-way over the property of third parties or to otherwise expand easements to accommodate requests for access. For example, GTE erroneously states that the access sought by Teligent's Petition would materially burden the underlying property and would therefore preclude access to the easement by other telecommunications carriers.[6] Consistently, state courts have found that granting

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[6] GTE Comments at 4. The utilities' plain disregard for the authority of federal law -- Section 224, specifically -- is astonishing and unfortunately typical of the monopolists' response to Congress' attempts to provide for competition. For example, despite the mandate of Section 224, GTE claims that many of its rights-of-way are "non-assignable." Id. The Edison

third party access to private easements in a manner similar to that proposed by Teligent is not sufficiently burdensome to be impermissible under an original utility easement.[7] The utilities' claims to the contrary are particularly disingenuous in light of their use of their own rights-of-way for non-core service offerings. For example, some electric companies are leveraging their monopoly status by providing telecommunications services using their existing rights-of-way. Indeed, today's Washington Post discusses PEPCO's provision of local telephone service to the District of Columbia and notes that

> power companies . . . own power-line rights of way reaching into virtually every corner of urban America. Along them they are laying

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Electric Institute/UTC assert that "[e]lectric utilities do not have the authority to convey access to private building rooftops owned by third parties, and nothing in Section 224 alters this fact." EEI/UTC Comments at 18 (emphasis added). If, as EEI/UTC suggest, Section 224 does not grant access to utility rights-of-way, substantial portions of that provision would be rendered meaningless.

[7] See, e.g., Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (1985)("We fail to see how the addition of cable equipment to a preexisting utility pole materially increased the burden on appellants' property."); see also Shaffer v. Video Display Corp., 539 N.E.2d 170, 173 (Ohio 1988)("We do not believe the installation of a television cable three-fourths of an inch in diameter, buried thirty inches below the land's surface, is an additional or substantial burden on appellees' property."); see also White v. City of Ann Arbor, 281 N.W.2d 283 (Mich. 1979); Shadow West Apartments v. Florida, 498 So.2d 589 (Fla. 1986); Consolidated Television Serv., Inc. v. Leary, 382 S.W.2d 78 (Ky. 1964). Indeed, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 9 F.3d 1394, 1396 (9th Cir. 1993).

more fiber-optic cable to fill gaps in their communications network.[8]

The Commission should ignore as an anticompetitive contrivance the utilities' claims that they often cannot grant third-party access to their private rights-of-way.

IV. THE COMMISSION SHOULD PRESCRIBE RULES WHICH EXPRESSLY PROVIDE FOR ACCESS TO UTILITY RIGHTS-OF-WAY WITHIN AND ON TOP OF BUILDINGS.

The statute clearly requires nondiscriminatory access to utilities' rights-of-way at just and reasonable rates, terms, and conditions.[9] Unless the Commission gives full effect to Section 224, many Americans who live and work in buildings may find

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8 Martha M. Hamilton, "The Power To Link Masses?" The Washington Post, May 22, 1998 at D4; see also Martha M. Hamilton and Mike Mills, "PEPCO Plans Phone, Web, Cable Service," The Washington Post, Aug. 6, 1997, at A12 (In reporting on the PEPCO/RCN venture to offer telephony and video services in the District of Columbia, the article notes that "PEPCO's more important contribution to the venture is its vast network of access to the region's homes and businesses through the rights of way it owns to provide electrical power." The incumbent advantage of not encountering right-of-way entry barriers is reflected by a Bell Atlantic vice president's comment: "They've already got rights of way and conduits. They certainly have the skills and the work force to pull more fiber in, just like they could pull in electrical wires."). Last year, two utilities announced their intention to join forces with AT&T to offer a combination of utility and telecommunications services. Benjamin A. Holden, "UtiliCorp and Peco, Aided by AT&T, To Launch One-Stop Utility Service," Wall St. J., June 24, 1997, at A3. The Commission's rules contemplate the conduction of radio signals through public utility A/C power lines for transmission to AM radio receivers. 47 C.F.R. § 68.15.207 (establishing electric utility conduction limits). Moreover, the Wall Street Journal reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses. Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall St. J., Oct. 7, 1997, at B6.

9 47 U.S.C. § 224(e)(1).

themselves without a choice of telecommunications carriers or without the lower cost service and range of offerings contemplated by telecommunications competition. Indeed, Chairman Kennard recently noted that "some wireless providers are gearing up to compete against wireline providers. We should explore every available opportunity to promote that competition."[10] The Commission may realize one such opportunity by confirming that utility rights-of-way within and on top of buildings are subject to the just, reasonable and nondiscriminatory access requirements of Section 224.

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10 Third Annual Commercial Mobile Radio Services Competition Report, Separate Statement of Chairman William E. Kennard, May 14, 1998.